

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

<b>DENNIS ALLEN, et al.</b>	:	
	:	Case No. C-1-01-159
<b>Plaintiffs</b>	:	
	:	Judge Herman S. Weber
<b>v.</b>	:	
	:	Magistrate Judge Timothy S. Hogan
<b>JOHN CRARY, et al.</b>	:	
	:	
<b>Defendant/ Third-Party Plaintiff</b>	:	
	:	<b>THIRD-PARTY DEFENDANTS</b>
<b>v.</b>	:	<b>POLLY JONES S AND SHIRLEY</b>
	:	<b>MONROE S MOTION TO</b>
	:	<b>CLARIFY THE ORDER</b>
<b>POLLY JONES, et al.</b>	:	<b>DENYING AS MOOT THEIR</b>
	:	<b>EXPEDITED MOTION TO</b>
<b>Third-Party Defendants</b>	:	<b>CONTINUE THE DISPOSITIVE</b>
	:	<b>MOTIONS DEADLINE ON</b>
	:	<b>THIRD-PARTY CLAIMS ONLY</b>

\* \* \* \* \*

Third-Party Defendants, Polly Jones ( Jones ) and Shirley Monroe ( Monroe ), move this Court to clarify its Order denying as moot Jones s and Monroe s Expedited Motion to Continue the Dispositive Motions Deadline on Third-Party Claims Only, entered on November 12. (R. 89). Regrettably, the Order mistakenly identified the wrong deadline that was the subject of the expedited motion. Jones and Monroe had sought an extension of the motion for summary judgment filing deadline, not the deadline for filing a motion to dismiss. As explained more fully below, Jones and Monroe move the Court to clarify the November 12 Order.

### **MEMORANDUM IN SUPPORT**

On April 16, 2003, Defendant John L. Crary ( Crary ) filed a Third-Party Complaint for Indemnity against Jones and Monroe. (R. 45). On May 9, Jones and Monroe filed, in response, a Motion to Dismiss Crary s Third-Party Complaint for Failure to State a Claim ( Motion to Dismiss ). (R. 49). The Court did not immediately rule on this motion. Many months later, after the close of discovery on September 15, the Motion to Dismiss still had not been decided and the deadline for motions for summary judgment, on October 15, was fast-approaching. The undersigned approached Crary s counsel about an extension of the motion for summary judgment deadline, with respect to these third-party claims asserted by Crary, until such time as the Court ruled on the Motion to Dismiss. Crary s counsel refused. When asked if he would participate in an informal discovery conference with the Court to discuss an extension of this deadline, he refused again.

Accordingly, on September 26, Jones and Monroe filed their Expedited Motion to Continue the Dispositive Motions Deadline on Third-Party Claims Only ( Expedited Motion to Continue ).<sup>1</sup> (R. 60). They also formally requested an informal discovery conference with the Court. Jones and Monroe did not receive a response from the Court on their request or motion. Out of an abundance of caution, Jones and Monroe filed their respective motions for summary judgment on November 10. (R. 80, 84). Two

---

<sup>1</sup> In his Response to the Expedited Motion to Continue, Crary actually did not oppose the Court s granting an extension of the dispositive motions deadline for the third-party claims. (R. 64). Rather, his only objection to the motion was that the Court should consider continuing other deadlines, such as the trial date, in addition to the dispositive motions deadline.

days later, on November 12, Magistrate Judge Hogan issued his Report and Recommendation, denying Jones's and Monroe's Motion to Dismiss. (R. 88).

Also on November 12, the Court denied as moot the Expedited Motion to Continue. (R. 89). In its Order, the Court explained that the motion was moot because Jones and Monroe already had timely filed their motion to dismiss in May, which was several months before the dispositive motions deadline of October 15. However, the subject of the Expedited Motion to Continue was the motion for summary judgment deadline, not the motion to dismiss deadline.

For this reason, Jones and Monroe seek a clarification of the Order. It is indeed correct that the Expedited Motion to Continue is now moot, because Jones and Monroe already filed their respective motions for summary judgment on November 10. However, Jones and Monroe ask the Court to clarify that the Order did not render their motions for summary judgment untimely. These motions certainly deserve to be decided on their merits.<sup>2</sup> As set forth in the memoranda in support of these motions for summary judgment, Crary has no claim for indemnity against Monroe or Jones based on the undisputed facts of this case. (R. 81, 85).<sup>3</sup>

Monroe and Jones therefore seek a clarification of the November 12 Order, so that it reflects that the Expedited Motion to Continue was mooted because Jones and

---

<sup>2</sup> On this same basis, the Court should grant Plaintiffs' Motions to Continue the Dispositive Motion Deadline (R. 66), upon which the Court has not yet ruled. Having not received a decision on the motion to continue and out of an abundance of caution, Plaintiffs filed their respective motion and cross-motion for summary judgment against Defendants Crary and Leonard Kristal on November 10 (R. 72, 75), the same date Plaintiffs timely filed their memorandum in opposition to Crary's motion for summary judgment.

<sup>3</sup> Jones and Monroe did not move for summary judgment solely on the basis set forth in the Motion to Dismiss; rather, they are also entitled to summary judgment based on the evidence adduced in this case.

Monroe filed their motions for summary judgment and, having been submitted, the Court will now consider these motions on their merits.

Respectfully submitted,

s/ Stephen A. Simon

---

David M. Cook (Ohio Bar #0023469)  
Stephen A. Simon (Ohio Bar #0068268)  
DAVID M. COOK, LLC  
22 West Ninth Street  
Cincinnati, Ohio 45202  
Phone: (513) 721-7500  
Fax: (513) 721-1178  
Email: [dcook@dmcllc.com](mailto:dcook@dmcllc.com)  
Trial Attorneys for Third-Party Defendants,  
Shirley Monroe and Polly Jones

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served this 14th day of November, 2003, via U.S. regular mail, postage prepaid, upon the following:

Leonard Kristal  
107 Diablo Drive  
Kentfield, California 94904

Stephen R. Felson  
617 Vine Street  
Suite 1401  
Cincinnati, Ohio 45202  
Trial Attorney For Defendant Crary

Paul D. Marotta  
Christopher D. Denny  
Jennifer Chen  
The Corporate Law Group  
500 Airport Blvd., Suite 120  
Burlingame, CA 94010  
Of Counsel for Defendant Crary\_\_

s/ Stephen A. Simon

---

ATTORNEY FOR POLLY JONES AND  
SHIRLEY MONROE